Supreme Court, U.S.
FILED

(1)

03 800 NOV 26 2003

No.

IN THE

Supreme Court of the United States

LAWRENCE SHERMAN,
Petitioner

v.

LYNNE SHERMAN
Respondent

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

JONATHAN S. GREENE
Counsel of Record
KRISTINE K. HOWANSKI
Howanski & Greene
401Washington Ave.
Towson, MD 21204
410-296-8166

68 pp

Questions Presented

I. Did the State Court err in disregarding the broad discharge of bankruptcy claims recognized in *Johnson v. Home State Bank*?

II. Should state courts be allowed to disregard the broad discharge of bankruptcy claims recognized in *Johnson v. Home State Bank*?

TABLE OF AUTHORITIES

CASES

Choate v. Choate
97 Md. App. 347, 629 A.2d 1304 (1993) 12

Dexter v. Dexter
105 Md. App. 678, 661 A.2d 171 (1995),
cert. denied, 341 Md. 27, 668 A.2d 36 (1995) 12, 17

Farrey v. Sanderfoot
500 U.S. 291 (1991) 5

Grady v. A.H. Robins Co.
839 F.2d 198 (4th Cir. 1988) 16

In re Aslan
65 B.R. 826 (Bankr. C.D. Cal. 1986), *rev'd on other grounds*, 909 F.2d 367 (9th Cir. 1990). 9, 10, 19

In re Ter Bush
273 B.R. 625 (Bankr. S.D. Cal. 2002). 10, 11

In re Udell
18 F.3d 403 (7th Cir. 1994) 12, 13, 19

In re Young
214 B.R. 905 (Bankr. D. Idaho 1997). 10, 19

Johnson v. Home State Bank
501 U.S. 78 (1991) 5, 14, 15, 16, 17, 18, 19

Kennedy v. Medicap Pharmacies, Inc.
267 F.3d 493 (6th Cir. 2001) 12, 13, 19

Keys v. Keys
93 Md. App. 677, 614 A.2d 975 (1992) 12

Ohio v. Kovacs
469 U.S. 274 (1985). 7, 8, 9, 11

Paradiso v. Paradiso
88 Md. App. 343, 594 A.2d 1200 (1991),
cert. denied, 325 Md. 95, 599 A.2d 447 (1991) 12

Pennsylvania Dept. of Public Welfare v. Davenport
495 U.S. 552 (1990) 16, 17

Roxse Homes, Inc. v. Roxse Homes Ltd. Partnership
83 B.R. 185 (D. Mass 1988), *aff'g In re Roxse Homes, Inc.*,
74 B.R. 810 (D. Mass 1987). 8, 19

Stewart Foods, Inc. v. Broecker
64 F.3d 141 (4th Cir. 1995) 15

STATUTES

11 U.S.C. § 101(5) 1, 2, 5, 14, 15

OTHER MATERIALS

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 309 (1977),
reprinted in 1978 U.S.C.C.A.N. 5963, 6266 16

S. Rep. No. 95-989, 95th Cong., 2d Sess. 22 (1978),
reprinted in 1978 U.S.C.C.A.N. 5787, 5808 16

OPINIONS BELOW

The Order of the Maryland Court of Appeals denying the Petition for Writ of Certiorari is reported at 831 A.2d 5, 376 Md. 546 (2003) and is reproduced in the Appendix at A1. The Order of the Maryland Court of Special Appeals denying reconsideration is unreported and reproduced in the Appendix at A2. The Opinion of the Maryland Court of Special Appeals affirming the judgment below is unreported (No. 1367, Sept. term 2001) and reproduced in the Appendix at A3-A21. The Amended Order of the Circuit Court for Harford County of August 3, 2001 is unreported and reproduced in the Appendix at A22-A23. The Opinion and Order of the Circuit Court for Harford County of July 31, 2001 is unreported and reproduced in the Appendix at A24-A43.

JURISDICTION

The Maryland Court of Appeals denied the Petition for Writ of Certiorari by Order of August 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

11 U.S.C § 101(5) in pertinent part provides:

> [C]laim means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured[.]

STATEMENT OF THE CASE

A. The Parties, the Bankruptcy and the Divorce

Petitioner Lawrence R. Sherman and Respondent Lynne P. Sherman were married to each other on July 5, 1975. During the course of the marriage, two children were born to the parties, namely Angela Sherman and Christopher Sherman, both of whom reached the age of 18 years and thus were emancipated prior to the commencement of divorce proceedings. The parties separated on or about December 28, 1998. The parties entered into a Marital Settlement Agreement on June 30, 1999. Among other things, the agreement provided that Mr. Sherman would take the following actions:

1) Transfer to Ms. Sherman his one-third interest in a townhouse owned jointly with Ms. Sherman and the parties' daughter;

2) Transfer to Ms. Sherman his one-quarter interest in the parties' time share units located in Pennsylvania and Florida;

3) Sign an MVA Gift Certification form and transfer the title of a 1997 Lincoln Town Car to Ms. Sherman.

4) Turn over certain personal property to Ms. Sherman.

The Agreement also provided that the parties would annually alternate usage of their jointly owned timeshare unit in Cancun, Mexico.

The parties reached a disagreement over the provisions of the agreement, and Ms. Sherman filed a complaint seeking enforcement of the agreement just five months after its execution, on December 6, 1999. After some negotiation, the parties appeared before Judge William O. Carr in the Circuit Court for Harford County, Maryland on April 11, 2000, and they placed the terms for a modification of the agreement on the record. Among the modifications was a provision whereby the parties would sell their Cancun timeshare unit and split the proceeds of sale. The other modification of note was that Mr. Sherman would evenly transfer his one-third interest in the Towson townhouse to Ms. Sherman and the parties' daughter so that each of the recipients would own half of the property.

On October 12, 2000, Mr. Sherman filed a Chapter 13 petition for bankruptcy in the U.S. Bankruptcy Court for the District of Maryland. The Circuit Court for Harford County, Maryland stayed the domestic relations case pending the bankruptcy action. Mr. Sherman's Chapter 13

case was converted to a Chapter 7 case. Ms. Sherman and her counsel received proper notice of the bankruptcy proceedings, and they attended the meeting of creditors. Ms. Sherman, however, never filed any objection to the discharge of Mr. Sherman's debts. Mr. Sherman was granted a discharge by the bankruptcy court for all the claims against him on April 3, 2001.

On June 25, 2001, the parties appeared before Judge Maurice W. Baldwin, Jr., in the Circuit Court for Harford County, Maryland, for the trial of the divorce. Counsel for Petitioner argued that the property obligations of the Petitioner were discharged in the bankruptcy action, thereby raising the federal question in this case. At the conclusion of trial, Judge Baldwin directed counsel to submit memoranda regarding the impact of the bankruptcy discharge. Although he asked counsel to submit memoranda on the issue, Judge Baldwin articulated at the close of the hearing an inclination to require Mr. Sherman to make certain property transfers. After reviewing the attorneys' memoranda, on July 31, 2001, Judge Baldwin issued a Memorandum Opinion and Order and Judgment of Absolute Divorce consistent with his statements from the bench that set out particular obligations for each party from the Marital Settlement Agreement and the modifications made on the record made in April 2000. In particular, Judge Baldwin found that certain obligations for transfer of property by Mr. Sherman were not discharged by the bankruptcy court. Among other things, Judge Baldwin ordered Mr. Sherman to transfer his interest in the timeshares, the Towson townhouse, certain personal property and the Lincoln automobile, and he ordered that the Cancun timeshare be sold and the proceeds of sale divided between the parties.

In reviewing the federal law to determine whether Mr. Sherman's contractually agreed obligations should be enforced or considered discharged by the bankruptcy court, Judge Baldwin embraced the federal question before this Court. (Appendix at XX) The judge correctly identified the statute that governs the definition of a claim, namely 11 U.S.C. § 101(5). The statute provides the following:

> [C]laim means –
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured[.]

In order to ascertain whether a particular legal obligation meets the definition of "claim," the reviewing court engaged in "straightforward statutory construction to be resolved by reference to 'the text, history and purpose' of the Bankruptcy Code." *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991), quoting *Farrey v. Sanderfoot*, 500 U.S. 291, 298 (1991).

Judge Baldwin attempted to engage in statutory construction, but he based his decision on a misinterpretation of the statute. In the Memorandum

Opinion, Judge Baldwin set forth the following explanation for his order:

> According to bankruptcy law, if a claim means a "right to payment" as it is so broadly defined by Congress, then it would follow that any pre-petition claim that Plaintiff has against Defendant which requests monetary relief or could possibly result in a claim for monetary payment(s) is unenforceable at this point based on Defendant's discharge in bankruptcy. Therefore this Court no longer has authority to enforce any pre-bankruptcy obligations of the Defendant which result in a monetary award or payment to the Plaintiff. However, any obligations of the Defendant to the Plaintiff arising out of the Agreement and subsequent stipulation on the record which are solely equitable and do not foreseeably result in a claim for monetary relief, are valid and enforceable obligations. Thus, this Court has the authority to compel specific performance of certain outstanding property settlement obligations remaining between the parties.

According to the language contained in the Memorandum, the trial judge read the bankruptcy statute's definition of claim to exclude legal obligations that are solely equitable and that do not result in foreseeable claims for monetary relief. The trial judge then classified certain property settlement legal obligations as to be within this latter category, disregarding whether the equitable claims could

give rise to right of payment.

Judge Baldwin issued an Amended Order on August 3, 2001 in order to correct the spelling of Ms. Sherman's maiden name in the original order.

B. Appellate Court Proceedings

Petitioner appealed the orders of the Circuit Court for Harford County to the Maryland Court of Special Appeals. The parties filed briefs and appeared for oral argument before Judges Andrew L. Sonner, James A. Kenney III, and Lawrence F. Rodowsky (retired). The Maryland Court of Special Appeals issued an Opinion in the case on April 21, 2003, which affirmed the decision of the Circuit Court for Harford County.

In writing the opinion for the Maryland Court of Special Appeals, Judge Rodowsky struggled with the congressional intent of the bankruptcy discharge statute, relying on the case of *Ohio v. Kovacs,* 469 U.S. 274 (1985), to shore up the argument that some circumstances must exist where equitable claims do not give rise to right of payment. In that case, a pollution cleanup order (an affirmative injunction) was construed as having been "converted" into an obligation to pay money, insofar as the polluter did not comply with the cleanup order and an appointed receiver performed the tasks and sought reimbursement. Judge Rodowsky proposed that the affirmative injunction in *Ohio v. Kovacs* was not an order for the payment of money, but the breach of that injunction was "converted" into a separate damage remedy that was a dischargeable claim. Judge Rodowsky did not comment that this Court in *Ohio v. Kovacs* also noted that breach of

the injunction could have resulted in contempt or criminal penalties. This Court's decision therefore makes the distinction between the remedy of specific performance for the original environmental wrongs (stage one relief) and the remedies to be applied when specific performance does not occur (stage two relief). This Court in *Ohio v. Kovacs* does not address whether money damages could have been sought as an alternative to the specific performance remedy found in the initial affirmative injunction to clean up the pollution (stage one relief). In the case of the Shermans, the Petitioner's obligations under the parties' marital settlement agreement could be satisfied either by money damages or by specific performance. As a result, Petitioner's specific performance liability should have been negated by his bankruptcy discharge.

Recognizing that Maryland law had not addressed these issues previously, Judge Rodowsky also grappled with conflicting opinions from other states that have considered aspects of this case. But rather than focusing on the laws of states such as Idaho, which most congruently reflects the laws of Maryland, Judge Rodowsky looked to the laws of states in which Maryland's remedies are clearly unavailable. Judge Rodowsky first considered *Roxse Homes, Inc. v. Roxse Homes Ltd. Partnership,* 83 B.R. 185 (D. Mass 1988), *aff'g In re Roxse Homes, Inc.,* 74 B.R. 810 (D. Mass 1987). The *Roxse* case noted that an award of specific performance in Massachusetts indicates that money damages are inadequate, and thus specific performance obligations are not dischargeable claims. In contrast, Maryland law does not recognize the same principle of excluding money damages as inadequate per se when specific performance is awarded. Although Judge Rodowsky's opinion relied on the *Roxse* case, the

Massachusetts opinion offered no guidance to the case of the Shermans nor to Maryland law.

Judge Rodowsky then considered the California case, *In re Aslan,* 65 B.R. 826 (Bankr. C.D. Cal. 1986), *rev'd on other grounds,* 909 F.2d 367 (9th Cir. 1990). The *Aslan* court noted that a debtor can reject an executory contract for sale in bankruptcy, thus transforming the potential specific performance action into a dischargeable claim. Judge Rodowsky compared this "conversion" to the one he construed in *Ohio v. Kovacs,* stating that the "non-debtor party's election of the equitable remedy of specific performance, a nonclaim remedy, would be transformed into a claim by rejection." In California, however, the person who elects to reject the contract and invoke the remedy of specific performance is the debtor, not the creditor. If the creditor had the choice of performance or damages, the debtor's rejection of the contract would remove the damages option, leaving the option of specific performance, which the *Aslan* court viewed as dischargeable. The *Aslan* court did not say whether the claim would be discharged if the creditor had the ability to choose specific performance as its remedy, but nothing in that case suggested that specific performance would be anything but dischargeable. In contrast to *Ohio v. Kovacs,* where failure to perform an affirmative obligation can subject one to money damages for the costs incurred by someone else who performs the obligation, the *Aslan* court identified that rejection of an affirmative obligation gives rise to the right of specific performance. There is nothing in the *Aslan* case to support the comparison set forth by Judge Rodowsky and there is no connection identified between the circumstances of the *Aslan* case and the case of the Shermans.

To support his position, Judge Rodowsky argued that another California case also holds "that an asserted right to specific performance is not a claim." *In re Ter Bush*, 273 B.R. 625 (Bankr. S.D. Cal. 2002), noted that breach of an agreement to transfer real property (a single family dwelling) cannot be adequately compensated by money damages, pursuant to California statute. Because money damages were thus inadequate, the breach could not give rise to a right of payment and thus would not be discharged in bankruptcy. Maryland contains no such statute or case law, and thus the case does not bear on Judge Rodowsky's interpretation of the Petitioner's obligations. Furthermore, the *Aslan* court did not hold that an asserted right to specific performance is not a claim, as Judge Rodowsky claimed. The *Aslan* opinion only held that the involuntary right to specific performance is a claim and remained silent with regard to the issue of an asserted right to specific performance. *Aslan* leaves the result as the same in either case in that the creditor remains with the right of specific performance, be it voluntary or involuntary. If the creditor could choose performance or damages for the breach, then the underlying breach gives rise to a right of payment, precisely as indicated in 11 U.S.C. § 101(5).

Judge Rodowsky momentarily located the proverbial needle in the haystack, but then let it slip away. Judge Rodowsky considered *In re Young*, 214 B.R. 905 (Bankr. D. Idaho 1997), noting that in Idaho, money damages are adequate for breach of contract and thus specific performance can be discharged in bankruptcy. Judge Rodowsky did note that "Idaho law does not differ from that of Maryland." In Idaho, specific performance is a dischargeable claim. With these same legal underpinnings, Judge Rodowsky could have found that specific

performance should also be dischargeable in Maryland, but concerned about squeezing a legal result into the proverbial Procrustean bed, the judge simply brushed aside the key observation of the similarity between Idaho and Maryland by stating, "We are not persuaded by the reasoning of the Idaho court." Without any elaboration, Judge Rodowsky stated that the case "seems inconsistent" with limited legislative history and the rationale employed in *Ohio v. Kovacs,* even though there is nothing in the limited legislative history that would prohibit the Idaho court and the Maryland court from taking the position that specific performance can be discharged where money damages are an adequate alternative remedy. The concern expressed in the statute's legislative history is where only nominal damages are available, which would clearly be inadequate. Similarly, the focus of *Ohio v. Kovacs* is breach of a court order for specific performance that resulted in money damages: In *Ohio v. Kovacs*, the obligation of specific performance had already matured and the resulting breach of that obligation is what gave rise to a right of payment, not the breach of some other obligation that could result in specific performance. For the Shermans, there is no existing order for specific performance, and thus the breach of the underlying obligation could result in specific performance or money damages, unlike in *Ohio v. Kovacs.*

Dissatisfied by the law of Idaho, Judge Rodowsky steered instead toward the *In re Ter Bush*, in which the California court was forced to make a determination based on the California statute which per se finds money damages inadequate to cure breach of an agreement to transfer real property (a single family dwelling). Maryland lacks any such statute, or any case law for that matter, which holds that money damages are inadequate to cure breach of an

agreement to transfer real property. To the contrary, Maryland law is flooded with examples of the application of monetary values to assets in divorce, and how the valuation of such assets is required in marital property determinations.[1] Judge Rodowsky tried to tie up the supposedly strong analogy by pointing out that the Respondent sought only an affirmative injunction and not damages, and thus payment of money was not an alternative since it was not viable or adequate. While payment of money might not be adequate under the California state statute, there is no such bar in Maryland law, as Judge Rodowsky explicitly recognized in his analysis.

Judge Rodowsky also asserted that two cases dealing with the enforcement of covenants not to compete support the conclusion that Petitioner's specific performance obligations were not discharged in bankruptcy. However, neither *In re Udell,* 18 F.3d 403 (7th Cir. 1994)

---

1 Breach of a marital settlement agreement provision for the transfer of property can give rise to a claim for money damages. *See Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171 (1995). In *Dexter*, the Court awarded money damages to a spouse who was supposed to receive a portion of her spouse's pension benefit on an "if, as and when" basis. In the case at hand, monetary values can be ascertained for real property, time share property, a motor vehicle, and personalty such as furniture. *See Choate v. Choate*, 97 Md. App. 347, 629 A.2d 1304 (1993) (valuation of real property performed by appraiser); *Keys v. Keys*, 93 Md. App. 677, 614 A.2d 975 (1992) (valuation of automobile); *Paradiso v. Paradiso*, 88 Md. App. 343, 594 A.2d 1200 (1991), *cert. denied*, 325 Md. 95, 599 A.2d 447 (1991) (valuation of personalty such as furniture). Such valuations are required in most divorce cases where a spouse seeks a transfer of marital property. Breach of a marital settlement agreement to transfer property can thus lead to a claim for the value of the property to be transferred as damages for the breach.

nor *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493 (6th Cir. 2001), accomplish this goal. *In re Udell* held that a right to equitable relief for breach of performance is a claim if the right to payment is an alternative remedy, because the two remedies are substitutes for each other. The *Udell* court found that the breach in its case gave rise to two independent remedies - specific performance as a negative injunction for future behavior and liquidated damages for the past harm. The *Udell* court specifically noted that there was no money damage that would be a substitute for the injunction not to breach the covenant not to compete. 18 F.3rd 403, 409-410 (1994). For the Shermans, the Respondent could have sought money damages in lieu of specific performance, insofar as the property was of the type that could be valued, as opposed to the damages in *Udell.*

Kennedy v. Medicap Pharmacies, Inc. aptly noted that a claim is deemed discharged if the court finds that a monetary award is adequate compensation and an injunction not appropriate. Insofar as *Kennedy* is also a case involving breach of a covenant not to compete, as opposed to transfer of property between spouses, it is not surprising that the case concurred with the *Udell* court. Neither *Kennedy* nor *Udell* have any relevance to the situation facing the Shermans.

Petitioner filed a motion for reconsideration with the Court of Special Appeals on May 21, 2003. The Court of Special Appeals denied the motion on June 10, 2003 and issued the mandate on the same day. The Petitioner filed a Petition for Writ of Certiorari with the Maryland Court of Appeals. The Petition was denied on August 28, 2003.

REASONS FOR GRANTING THE PETITION

The state courts of Maryland have attempted to eviscerate the legislative intent of Congress in enacting 11 U.S.C. §101(5) and the judicial intent of this Court in upholding the breadth of bankruptcy discharge in *Johnson v. Home State Bank*, 501 U.S. 78 (1991). By placing narrow constraints on a federal law interpreted by this Court, the state courts are undermining the authority of this Court to interpret definitively the meaning of federal law. The appellate opinion in this case further points to conflict among federal and state courts that have decided this issue. The petition should be granted because the state court holdings fundamentally misconstrue this Court's holding in *Johnson v. Home State Bank* and suggest only further confusion among the states in interpreting 11 U.S.C. §101(5).

1. THE STATE COURT ERRED IN DISREGARDING THE BROAD BANKRUPTCY DISCHARGE RECOGNIZED IN *JOHNSON V. HOME STATE BANK*

In both the trial court opinion from the Circuit Court for Harford County and the appellate opinion from the Maryland Court of Special Appeals, the case of *Johnson v. Home State Bank* is disregarded. Both opinions actually ignore the *Johnson* case almost entirely. Judge Baldwin's Memorandum opinion only notes the case in a string citation (A33), while Judge Rodowsky's opinion only notes that Petitioner raised the case to support his claim (A7). Neither opinion addresses this Court's intent in identifying

the breadth of discharge of bankruptcy obligations.

Under 11 U.S.C. §101(5), a claim is defined as:

> (1) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
>
> (2)right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured [.]

Judge Baldwin's decision in the Circuit Court for Harford County was based on a misinterpretation of the statute in which he failed to give the definition of claim the broadest available definition intended by Congress to deal with all of a debtor's legal obligations, as directed by this Court in *Johnson* and the Fourth Circuit Court of Appeals in *Stewart Foods, Inc. v. Broecker*, 64 F.3d 141 (4th Cir. 1995). Judge Baldwin excluded claims that gave rise to a right to an equitable remedy for breach of performance if

such claims do not foreseeably lead to a right to payment, a limitation that is not contained within the statute and is at odds with congressional intent and the holdings of this Court. Congress intended by the language it used to adopt the broadest available definition of the term "claim." *Johnson* at 83; *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990). Congress intended that this broadest of definitions would deal with all of the debtor's legal obligations. As noted in the congressional reports prior to enactment of the statute:

> By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter 1 of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy court.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; S. Rep. No. 95-989, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808; *noted in Davenport* at 558; see *also Grady v. A.H. Robins Co.*, 839 F.2d 198, 200 (4th Cir. 1988).

In using the broadest possible definition of "claim," the this Court adopted an expansive reading of the concept of "right to payment":

> [T]o the extent the phrase "right to payment" is modified in the statute, the modifying language ("whether or not such right is . . .") reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a "claim" giving rise to a "debt."

Davenport at 558. The "plain meaning of 'right to payment' is nothing more nor less than an enforceable obligation . . ." *Id.* at 559; *cited in Johnson* at 83. Judge Baldwin correctly noted in the Memorandum that a claim that "could possibly result in a claim for monetary payment(s)" would be subject to the discharge of the bankruptcy court. However, Judge Baldwin redefined the statute to exclude obligations which are "solely equitable and do not foreseeably result in a claim for monetary relief." This unnecessarily narrow definition attempted to exclude enforceable obligations that otherwise would be discharged in bankruptcy. Such judicial reinterpretation undermines the authority of this Court.

Even if the narrowed redefinition utilized by Judge Baldwin should be accepted, the Petitioner's obligations would still fall within the scope of discharged claims. Breach of a marital settlement agreement provision for the transfer of property can give rise to a claim for money damages. *See Dexter v. Dexter* (In *Dexter*, money damages were awarded to a spouse who was supposed to receive a portion of her spouse's pension benefit on an "if, as and

when" basis.) For the Shermans, monetary values can be ascertained for real property, time share property, a motor vehicle, and personalty such as furniture. As noted in Footnote One above, monetary valuation of real property performed by appraiser, monetary valuation of automobiles, and monetary valuation of personalty such as furniture are routinely performed in divorce cases. Breach of a marital settlement agreement to transfer property can thus lead to a claim for the value of the property to be transferred as damages for the breach. As a result, the Petitioner's obligations could foreseeably give rise to a claim for monetary payments.

An equitable remedy for breach of performance that gives rise to a right of payment is a claim that is subject to discharge in bankruptcy. *Johnson* at 83. The Respondent's claims for property owned by Petitioner were discharged in his bankruptcy case. The Respondent could have challenged Petitioner's intention to discharge these claims in the bankruptcy court, but did not so. Insofar as Respondent did not challenge the discharge in bankruptcy court and Petitioner was granted a discharge of the claims against him, the Respondent should not be entitled to go behind the discharge to obtain relief for her property claims. Judge Baldwin did precisely this in misconstruing this Court's opinion in *Johnson.*

II. STATE COURTS ARE IN CONFLICT AS TO WHETHER THEY SHOULD DISREGARD THE BREADTH OF BANKRUPTCY DISCHARGE RECOGNIZED IN *JOHNSON V. HOME STATE BANK*

Judge Rodowsky's opinion in the Maryland Court of Special Appeals makes a review of how other states have addressed bankruptcy discharge issue for equitable claims. Judge Rodowsky noted that the states have differing views on how such claims should be handled. In Idaho, for example, money damages are adequate for breach of contract and thus specific performance can be discharged in bankruptcy. *In re Young*. Under Judge Rodowsky's opinion, Maryland should take an opposite view. In Massachusetts, money damages are not an adequate remedy for breach of contract. *Roxse Homes, Inc.* California allows for discharge of specific performance obligations under certain conditions (depending on who elects the remedy). *In re Aslan*. Depending on how a state looks at the issue, the outcomes can be diametrically opposed.

The federal cases do not assist the states in their reinterpretation of this Court's position in *Johnson*. The Sixth Circuit and Seventh Circuit cases on covenants not to compete (*In re Udell* and *Kennedy)* do not shed light on the specific performance obligations of property transfers, yet they are cited in support of state court positions. Finally, the use of *Ohio v. Kovacs*, a case which preceded this Court's opinion in *Johnson* by six years, does not clarify the Court's position with regard to dischargeability of equitable obligations in bankruptcy. Without a clear statement from this Court that equitable obligations are to be discharged in bankruptcy as the statute requires and *Johnson* supports, state courts will only continue to misconstrue what once appeared to be established as federal law on this issue.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JONATHAN S. GREENE
Counsel of Record
KRISTINE K. HOWANSKI
Howanski & Greene
401Washington Ave.
Towson, MD 21204
410-296-8166

LAWRENCE R. SHERMAN * IN THE

* COURT OF APPEALS

v. * OF MARYLAND

* Petition Docket No. 240
September Term, 2003

LYNNE P. SHERMAN *(No. 1364 Sept. Term, 2001,
Court of Special Appeals)

* * * * * *

ORDER

Upon consideration of the petition for a writ of Certiorari to the Court of Special Appeals filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that he petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

"s/ _____"
Chief Judge

Date: August 28, 2003

Lawrence R. Sherman, * In the

Appellant, * COURT OF SPECIAL APPEALS

v. * No. 1367

Lynne P. Sherman, * September Term, 2001

Appellee. *

* * * * * *

ORDER

This Court having considered Appellant's Motion for Reconsideration, it is this 10th day of June, 2003, by the Court of Special Appeals,

ORDERED that the Motion for Reconsideration is hereby denied.

For a panel of the Court consisting of Judge Kenney, Judge Sonner, and Judge Rodowsky (Retired, specially assigned)

CHIEF JUDGE'S SIGNATURE
APPEARS ON ORIGINAL ORDER

_____

Chief Judge

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1367

September Term, 2001

LAWRENCE R. SHERMAN

v.

LYNNE P. SHERMAN

Sonner,
Kenney,
Rodowsky, Lawrence F.
(Retired, specially assigned),

JJ.

Opinion by Rodowsky, J.

Filed: April 21, 2003

Appellant, Lawrence R. Sherman (Mr. Sherman), is aggrieved by a judgment of the Circuit Court for Harford County ordering him specifically to perform certain promises in a marital settlement agreement with the appellee, Lynne P. Sherman (Mrs. Sherman). The issue is whether Mr . Sherman's liability for specific performance has been discharged in bankruptcy.

The parties executed their marital settlement agreement (the Agreement) in June 1999. In December of that year Mrs. Sherman filed a complaint for specific performance of the Agreement. By mutual consent in open court at a hearing in April 2000, the Agreement was modified in particulars that are not material to the issue before us. Mrs. Sherman, in July 2000, sought an absolute divorce in the same action, and she amended that claim in September 2000. On October 12, 2000, Mr. Sherman filed a petition for bankruptcy in the United States Bankruptcy Court for the District of Maryland under Chapter 13 of the Bankruptcy Code, Title 11 U.S.C., which stayed the state court proceedings. That petition was later converted to one under Chapter 7 of the Bankruptcy Code.

In Schedule F, "Creditors Holding Unsecured Non priority Claims," Mr. Sherman listed Mrs. Sherman as a creditor, described her as holding "[v]arious claims arising from and/or relating to the marriage and separation of the parties." He stated the value of the claim to be "[u]nknown." By order of the bankruptcy court dated April 3, 2001, Mr. Sherman was granted a discharge under Title 11 U.S.C. § 727. [1] Under subsection (b) of §

---

1 Unless otherwise noted, all statutory references are to Title 11 U.S.C.

727, a "discharge under subsection (a) of [§ 727] discharges the debtor from all debts that arose before the date of the order for relief under [Chapter 7]." We are not further informed by the record before us concerning what transpired in Mr. Sherman's bankruptcy.

Thereafter, the parties returned to the Circuit Court for Harford County, where an absolute divorce decree was entered. That court also heard Mrs. Sherman's pending request for specific performance. Mr. Sherman opposed that relief, contending that the requested equitable relief was a claim barred by his discharge in bankruptcy.

Under § 101(12) "'debt' means liability on a 'claim.'" Section 101(5) defines "claim" to mean:

> "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured[.]"

The circuit court agreed with Mr. Sherman that all of [his] pre-petition 'right-to-payment' obligations, including those to [Mrs. Sherman] were clearly discharged by the bankruptcy court." The circuit court, however, further held

> "any obligations of [Mr. Sherman] to [Mrs. Sherman] arising out of the Agreement and subsequent stipulation on the record which are solely equitable and do not foreseeably result in a claim for monetary relief, are valid and enforceable obligations."

The court ordered Mr. Sherman to transfer his one-third interest in a townhouse in Towson, Maryland to Mrs. Sherman and to the parties' daughter, as joint tenants, to transfer his interests in a timeshare unit in the Poconos and in three timeshare units in Cocoa Beach, Florida to Mrs. Sherman, and to transfer or return to her certain personal property itemized on a referenced exhibit.[3] This appeal followed.[4]

Mr. Sherman basically makes two interrelated arguments. He contends that the order appealed from violates congressional intent which was to give "claim," as used in the Code, the broadest possible meaning. Alternatively, even if the construction employed by the trial court (obligations "solely equitable" are not "claims") was consistent with § 101 (5) (B), he submits that "[b]reach of a marital settlement agreement provision for the transfer of property can give rise to a claim for money damages." We shall consider these arguments together.

There is no doubt that § 101(5) was intended by Congress to have a very broad meaning, particularly in

---

3 Neither party argues that the outcome here might differ based upon differences in the types of property which are the subjects of the circuit court's order

4 Mrs. Sherman noted a cross-appeal but it was not briefed and has been abandoned.

contrast to "provable" claims under the predecessor Bankruptcy Act. *See* T. Matthews, *The Scope of Claims Under the Bankruptcy Code*, 57 Am. Bank. L.J. 221, 231 (1983). Mr . Sherman cites Pennsylvania Dep' t of Pub. Welfare v. Davenport, 495 U.S. 552, 110 s. .Ct. 2126, 109 L. Ed. 2d 588 (1990), where the Court referred H.R. Rep. No.95-595, at 309, U.S. Code Cong. & Admin. News 1978, p. 626, as "describing definition of 'claim' as 'broadest possible' and noting that Code 'contemplates that all legal obligations of the debtor. .. will be able to be dealt with in the bankruptcy case.'" Id. at 558, 110 S. Ct. at 2130. *Davenport's* holding was that restitution obligations, imposed as conditions of probation in state criminal actions, were "debts" dischargeable under Chapter 13.

For the proposition that "claim" is a very broad concept, Mr. Sherman also cites *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991). There the Court held that, after the debtor's personal liability on a note had been discharged in Chapter 7, the lien of the mortgage securing the loan evidenced by the note was a "claim" subject to inclusion in an approved Chapter 13 reorganization.

In the case before us the circuit court essentially held that Mrs. Sherman's "right to an equitable remedy for breach of performance" did not "give [ ] rise to a right [to] payment," § 101 (5) (B). The issue here is whether Mrs. Sherman's equitable remedy gave rise to "a right to payment." As we shall see, application of the "right to payment" concept in § 101(5) has not been free from difficulty for courts and commentators.

Section 101(5) is the product of a compromise between the original House and Senate versions of the Bankruptcy Reform Act. Originally, the House "would

have deemed a right to an equitable remedy for breach of performance [to be] a claim even if it did not give rise to a right to payment." *Ohio v. Kovacs*, 469 U.S. 274, 280, 105 S. Ct. 705, 708, 83 L. Ed. 2d 649 (1985) (footnote omitted). The Senate's initial definition of claim was narrower. Id.[5] In the compromise version that was finally adopted, "the key phrases 'equitable remedy', 'breach of performance,' and ' right to payment' are not defined ... nor are the differences between the successive versions explained." Id. at 280, 105 S. Ct. at 708.

The legislative history [of § 101 (5) (B)] offers only a statement by the sponsors of the Bankruptcy Reform Act with respect to the scope of the provision[.]" Id. As quoted in *Ohio v. Kovacs* one sponsor said:

> "'Section 101[5] (B) ... is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For

---

5 The third and final version of the Senate bill defined "claim" as follows:

"(4) 'Claim'--

"(A) means any right to payment, other than that of an expense allowable under section 503, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, legal, equitable, secured, or unsecured; and

"(B) includes, except where specifically provided otherwise, interest thereon provided by law or contract[.]"

Senate Bill 2266 (as reported August 10, 1978, from the Committee on Finance), 95th Cong., 2d Sess. {1978), § 101{4); 124 Cong. Rec. S. 13074 {daily ed. Aug. 10, 1978).

> example, in some States a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title 11.'"

Id. (quoting 124 Cong. Rec. 32393 (1978) remarks of Rep. Edwards) (footnote partially omitted).

The illustration by Rep. Edwards presents a version of the remedy of specific performance that is unknown to Maryland law. The illustration presupposes a judgment for specific performance which fixes an alternative amount of money damages, a refusal specifically to perform by the judgment debtor, and a satisfaction of the judgment by the judgment holder's enforcing the alternative right to payment. We recognize, however, that the illustration is not intended to exhaust the category of equitable "claims" or to illustrate equitable nonclaims.

One commentator, writing shortly after the adoption of the Code, presented a hypothetical to illustrate the difficulty caused by the lack of definition for, legislative history relating to, and operative federal policy underlying, the § 101(5) element of "right to payment."

> "A breach of performance is committed against a nondebtor party and the bankruptcy court looks to nonbankruptcy law to see what remedies arise from such a breach. Assume that the nondebtor party favors a finding that the breach gives rise to an equitable remedy that does not constitute a claim. Support for her position can come from analogous cases under nonbankruptcy

law where equitable relief was granted because of the difficulty of proving damages with reasonable certainty. In such cases, it can be argued that there is no alternative right to payment, save for a right to nominal damages, because the risk of undercompensating or unjustly enriching the plaintiff is too great. Moreover, the nondebtor party can reasonably assert that a right to nominal damages can not, as a matter of federal law, constitute a 'right to payment' given the policy that probably motivated the redrafting of section 101[5](B). The framers of the Code may have cut back the definition of claim so that the estimation and liquidation of equitable remedies under section 502(c) would be more equitable for nondebtor parties and more administrable for the courts. The cutback is rendered ineffectual and its underlying policy is thwarted if a right to nominal damages constitutes a 'right to payment' under the Code. This is because nonbankruptcy law invariably allows nominal damages for breach of performance, even when damages are inadequate and equitable relief is available. Consequently, most, if not all, equitable remedies become claims under this interpretation of the phrase 'right to payment.' This in turn raises the estimation problems that the Code framers probably intended to mitigate by redrafting section 101[5](B). In addition, it is arguably

inequitable to force a nondebtor party to take a claim measured in dollars when, under nonbankruptcy law, money damages are inadequate and relief is limited to an equitable remedy or a right to nominal damages. Thus, the nondebtor party in this example can take the position that her right to an equitable remedy is not a claim under the Code in light of applicable nonbankruptcy law and the policy behind the compromise language of section 101[5] (B). The trustee in this example takes the opposite position and asserts that a claim under the Code does arise from the breach of performance. The trustee can make two basic arguments to support this position. First, he can argue that under applicable nonbankruptcy law this kind of breach of performance gives rise only to a right to payment. This can be demonstrated through analogous cases in which a right to damages was held to be an adequate remedy and equitable relief was denied. Second, even if the breach of performance gives rise to an equitable remedy under nonbankruptcy law, the trustee can argue that the breach also gives rise to an alternative 'right to payment' within the meaning of the Code. Support for this view can come from analogous cases under nonbankruptcy law in which equitable relief was granted, even though damages were found to be adequate and available at the plaintiff's election. In addition, the

> trustee can also take the position that a breach of performance always gives rise to an alternative right to nominal damages; and that such right is a 'right to payment' under the Code given the plain language of section 101[5](B) and the policy behind a broad definition of claim."

M.R. Julis, Classifying Rights and Interests Under the Bankruptcy Code, 55 Am. Bankr. L.J. 223, 240-42 (1981) (footnotes omitted).

Some guidance on the problem analyzed above was given in *Ohio v. Kovacs*, supra. An injunction bad been entered against Kovacs restraining him from further environmentally polluting a site and requiring him to remove specified wastes. Kovacs, who at some point bad taken bankruptcy, did not comply with the affirmative "cleanup," resulting in the appointment of a receiver to perform those tasks. Ohio sought a declaration in the bankruptcy court that Kovacs's obligation to clean up the site was not a liability on a claim and, therefore, not dischargeable. The Court, affirming all of the lower courts, held that the obligation to Ohio was dischargeable on the following rationale:

> "What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money. ...Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have

been satisfied. On the facts before it, and with the receiver in control of the site, we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy."

Ohio v. Kovacs, 468 U.S. at 283, 105 S. Ct. at 710 (emphasis added).

In the concluding section of its opinion, the Court emphasized what it had not decided. Among these caveats, the Court said:

"Fourth, we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy we here address. . . only the affirmative. duty to cleanup the site and the duty to pay money to that end."

Id. at 284-85, 105 S. Ct. at 710-11.

It was after the receiver began performing Kovacs's cleanup obligations under the injunction, and apparently expending funds advanced by Ohio to do so, that Ohio sought reimbursement for those advances. In that way the affirmative injunction was "converted" into a dischargeable claim. That reading of Kovacs strongly suggests that the initial affirmative injunction was not an order for the payment of money for Kovacs's breach of performance of his obligations under environmental laws.

The parties have not referred us to any judicial precedents on the issue before us, and our research indicates a split of authority. Roxse Homes, Inc. v. Roxse

Homes Ltd. Partnership, 83 B.R. 185 (D. Mass. 1988), aff'g In re Roxse Homes, Inc., 74 B.R. 810 {Bankr. D. Mass. 1987), granted relief from the bankruptcy stay to the holder of a judgment for specific performance. The bankruptcy court had concluded that the judgment was not a "claim" because, under Massachusetts law, it could not be satisfied by the payment of money damages. 74 B.R. at 818-19. The district court agreed, stating that § 101(4), now § 101(5), provided that "an equitable remedy will only constitute a claim if the underlying breach gives rise to a right to the payment of money damages." 83 B.R. at 188. Under Massachusetts law, however, "an award of specific performance imports a judicial finding that money damages are inadequate or inappropriate." Id. The decision can be viewed as considering that the theoretical remedy of electing to sue for money damages, even if inadequate, did not convert the specific performance remedy into a "claim."

This reading of § 101 (5) is confirmed by In re Aslan, 65 B.R. 826 (Bankr. C.D. Cal. 1986), rev'd on other grounds, 909 F.2d 367 {9th Cir. 1990).There, the nondebtor purchaser of realty had an action for specific performance pending in state court when the debtor filed in bankruptcy under Chapter 11. One issue before the court was whether the debtor should be permitted to reject the executory contract of purchase and sale under the business judgment test. Id. at 828. As a preliminary matter, the court concluded "that it must first determine the effect of rejection on the Specific Performance Action." Id. After reviewing the legislative history of present § 101(5) the court held as follows:

> "Damages for rejection of an executory contract become a claim dischargeable in the bankruptcy only if under state law the

> creditor would have the choice of more than one possible remedy, with one of the choices being a monetary claim. The filing of the bankruptcy and rejection of the contract under the bankruptcy shifts the choice of remedy from one which is solely in the hands of the creditor to a choice by the debtor, upon approval of the Court. Thus, in California, an executory contract for sale of real property can be rejected and the potential action for specific performance will be transformed into a pre-petition claim, which may be discharged in the bankruptcy."

Id. at 831. Thus, In re Aslan presents an analysis similar to that of Kovacs v. Ohio, supra. The nondebtor party's election of the equitable remedy of specific performance, a nonclaim remedy, would be "transformed" into a claim by rejection, in the same fashion as the affirmative cleanup order issued to Kovacs became a claim when Ohio sought reimbursement for the cleanup performed by the receiver.[6]

Also holding that an asserted right to specific performance is not a claim is In re Ter Bush, 273. B.R. 625 (Bankr. S. D. Cal. 2002}. That case arose out of an arbitrator's award of specific performance involving a single family dwelling. California Civil Code § 3387 provided that "'it is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation.'" Ter Bush, 273 B.R. at 628. Under the statute, that presumption was conclusive

---

6 Assuming arguendo, that Mr. Sherman could have rejected the Agreement, or parts thereof, under bankruptcy law, there is no evidence he did so.

where the property was a single family dwelling. The court reasoned that

> "[i]mplicit in the arbitrator's award for specific performance is that he considered and followed California law in this regard and that money damages were inadequate. The Court concludes that the arbitrator's award for specific performance is not a claim within the meaning of the Code because the underlying breach in this case does not give rise to a right to the payment of money damages."

Id. at 628-29.

The opposite conclusion was reached in In re Young, 214 B..R. 905 (Bankr. D. Idaho 1997). That court reasoned that, under Idaho law, a party aggrieved by a breach of contract may seek damages based on the expectation, the restitution, and the reliance interests. In this respect, Idaho law does not differ from that of Maryland. The court pointed out that "equitable relief, such as specific performance, could also fulfill the expectation interest," id. at 912, just as benefit of the bargain damages would vindicate that interest Because specific performance was not the only remedy available, but there was "an alternative right to payment available, "the creditor seeking specific performance presented a dischargeable claim. Id.

We are not persuaded by the reasoning of the Idaho court. It seems inconsistent with the limited legislative history and with the rationale employed by the Supreme Court in Kovacs. Further, there is a strong analogy between Maryland specific performance law and that of California as applied in the Ter Bush case.

In Maryland

"[a] court may not refuse to specifically enforce a contract on the ground that the party seeking specific enforcement has an adequate remedy in damages unless the party resisting specific enforcement shall:

"(1) Prove that the party has property from which the damages may be collected; or

"(2) Give bond in an amount to be determined by the court and with security approved by the court, to perform the contract or pay all costs and damages that may be adjudged for breach or nonperformance against the party resisting specific enforcement."

Maryland Code (1974, 2002 Repl. Vol.), § 3-601 of the Courts and Judicial Proceedings Article (emphasis added). Here, Mrs. Sherman sought only an affirmative injunction and not damages. Payment of money was not an alternative, because that remedy was not viable or adequate. Indeed, the circuit court could not have refused the remedy of specific performance against the recently bankrupt Mr. Sherman. Damages were not in any meaningful sense an alternative remedy.

Our conclusion is reinforced by the greater number of cases that have considered the meaning of a "right to payment" under § 101(5) in the context of enforcing covenants against competition. In re Udell, 18 F.3d 403 (7th Cir. 1994), is a leading case on that subject. Udell ' s former employer sued him for threatened breach of a noncompete agreement, claiming an injunction and liquidated damages as stipulated in the contract. After the state court had entered a preliminary injunction Udell filed

in Chapter 13. He argued that an equitable remedy is a claim unless the equitable relief is the sole remedy available for breach of the promised performance. Id. at 408.

The Seventh Circuit looked to the comments of a sponsor of the Bankruptcy Reform Act who stated that "'rights to an equitable remedy for a breach of performance with respect to which such breach does not give rise to a right to payment are not "claims" and would therefore not be susceptible to discharge in bankruptcy.'" Id. at 407 (quoting 124 Cong. Rec. 32393 (1978) (remarks of Rep. Edwards)). The Court then held that

> " a right to an equitable remedy for breach of performance is a 'claim' if the same breach also gives rise to a right to payment 'with respect to' the equitable remedy. If the right to payment is an 'alternative' to the right to an equitable remedy, the necessary relationship clearly exists, for the two remedies would be substitutes for one another. This is the example of 'claim' given in the legislative history."

Id. at 408. Applying that construction of § 101(5) to the facts before it, the Seventh Circuit concluded that the injunction was not a claim because the threatened breach in that case

> "could give rise to two independent remedies; (1) an injunction against the future realization of the threat, and (2) liquidated damages for the actual harm that has already accrued from the threat. [The plaintiff's] right to liquidated damages does not arise 'with respect to' its right to an injunction...

the two rights address entirely separate remedial concerns."

Id. at 409. The Court also noted that, if an injunction is a dischargeable claim unless it is the sole remedy, as argued by Udell, then the United States Supreme Court in Kovacs "should have ended the case" on the language of the statute. Id. at 408. We might add that the plaintiff in Udell presumably could have elected not to seek an injunction against future harm, but to undertake to prove damages as they accrued from time to time. That theoretical remedy is not mentioned in the opinion and would not seem to be "the alternative" to which the Court is referring.[7]

The Sixth Circuit recently has agreed with Udell. Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493 (6th Cir. 2001). That court reached its conclusion after a review

---

7 A concurring opinion in Udell reached the same result, but more forcefully.

"To appreciate the patent absurdity of implementing the plain text of Section 101(5) (B) one must keep in mind that this is a bankruptcy statute. If, following the plain language, an injunction may be stayed in bankruptcy anytime the underlying breach of contract or law also happens to give rise to money damages, the real-world results would be ludicrous. If we were to apply the plain text of § 101(5) (B) to individuals restrained by court orders--e.g. trespassers, polluters, stalkers, batterers--theoretically, simply by filing bankruptcy, the violator could escape from any restraining order prompted by a breach that also gave rise to an award of money damages. Certainly the parade of horribles is extensive, and I need not belabor it further. Since the text of § 101(5) (B) presents one of those extremely unique circumstances of patent absurdity, we may turn to the purpose, context and policy of § 101 (5) (B) to supplement its plain language." Udell, 18 F. 3d at 412 (Flaum, J., concurring) (footnote omitted).

of the cases which it summarized as set forth below:

> "The majority of bankruptcy courts have held that the right to equitable relief for breach of a covenant not to compete is not dischargeable in bankruptcy. Some cases, relying on Kovacs have held that the right is not a claim because compliance does not require the expenditure of money. See R. J. Carbone Co. v. Nyren (In re Nyren), 187 B.R. 424, 425 (Bankr. D. Conn. 1995); In re Hughes, 166 B.R. 103,106 (Bankr. S.D. Ohio 1994); May v. Charles Booher & Assoc. (In re May), 141 B.R. 940, 944 (Bankr. S.D. Ohio 1992); In re Peltz, 55 B.R. 66, 338 (Bankr. M.D. Fla. 1985); Carstens Health Indus. v. Cooper (In re Cooper), 47 B.R. 842, 845 (Bankr. W.D. Mo. 1985). Others have held that the injunctive right is not a claim because it is available only if the remedy at law is inadequate and there is, therefore, no right to payment arising from the breach. See In re Reppond, 238 B.R. 442, 443 (Bankr. E.D. Ark. 1999); In re Printronics, Inc., 189 B.R. 995, 1001 (Bankr. N.D. Fla. 1995); Oseen v. Walker (In re Oseen), 133 B.R. 527 (Bankr. D. Idaho 1991); In re Cox, 53 B.R. 829, 832 (Bankr. M.D. Fla. 1985). In some cases, the stay was lifted to permit a state court to determine whether monetary damages were adequate. If the state court found injunctive relief was appropriate, then injunctive relief was not construed by the bankruptcy court to

> be a claim. If the court found that a monetary award was adequate compensation and an injunction was therefore not appropriate, then the plaintiff's entire claim was discharged under 11 U.S.C. § 727(b). See, e.g., Cox, 53 B.R. at 832."

Id.at 496. The Court was unpersuaded by two cases to the contrary, In re Kilpatrick, 160 B.R. 560 (Bankr. E.D. Mich. 1993), and Maids Int '1, Inc. v. Ward, 194 B.R. 703 (Bankr. D. Mass. 1996).

Here there has been no demand by Mrs. Sherman for damages as an alternative to specific performance. Nor has the circuit court determined any damages or entered any judgment in the alternative. There is no §101(5) claim.

JUDGEMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.

LYNNE P. SHERMAN * IN THE

Plaintiff * CIRCUIT COURT

v. * FOR

LAWRENCE R. SHERMAN * HARFORD COUNTY

Defendant * Case No: 12-C-99-3055

* * * * * *

AMENDED ORDER

The Circuit Court for Harford County having been informed that the Plaintiff's maiden name was incorrectly spelled on the original Order of July 30, 2001, it is this _2_ Day of August, 2001,

ORDERED that paragraph two (2) of the July 30, 2001, Order be amended as follows:

1. The Plaintiff, LYNNE P. SHERMAN, is granted the use of her maiden name, **LYNNE P. TRAUTWEIN**; and.

2. All other remaining paragraphs in the July 30, 2001, Order shall remain unchanged.

IT IS SO ORDERED THIS __2__ Day of August, 2001.

_____

MAURICE W. BALDWIN, JR., Judge

cc: Henry W. Stewart, Esq.
Law Offices of Henry W. Stewart, P .A.
209 Courtland A venue
Towson, Maryland 21204

George A. Breschi, Esq.
409 Washington A venue, Suite 600
Towson, Maryland 21204

Jonathan S. Greene, Esq.
Howanski & Greene
410 Washington Avenue, Suite 803
Towson, Maryland 21204

LYNNE P. SHERMAN	* IN THE
Plaintiff	* CIRCUIT COURT
v.	* FOR
LAWRENCE R. SHERMAN	* HARFORD COUNTY
Defendant	* Case No: 12-C-99-3055

* * * * * *

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiff's Amended Complaint for Judgment of Absolute Divorce, Specific Performance, Damages and Other Relief. The matter was held sub curia after a hearing before the Court on June 25,2001. At the hearing, the Court granted Plaintiff a judgment of absolute divorce and the use of her maiden name, Lynne Paige Troutwein. The issue of whether the Court could enforce the parties' Marital Settlement Agreement subsequent to Defendant's discharge in bankruptcy Is the only remaining issue to be determined.

FACTUAL AND PROCEDURAL BACKGROUND

This is a case in which Plaintiff, Lynne P. Sherman (hereinafter "Plaintiff'), filed a Complaint on December 6, 1999, requesting that the Court order Defendant, Lawrence R. Sherman, (hereinafter "Defendant") to specifically perform under the terms of the parties' Marital Settlement Agreement as executed by the parties on June 30, 1999 (hereinafter "the Agreement"). In her Complaint, the Plaintiff specifically requested that the Defendant be

ordered to: 1) sign any and all documents necessary for the transfer of Defendant's one-third interest in the property of the townhouse located at 111 Marburth Avenue, Towson, Maryland 21286 (hereinafter "the Towson townhouse"), to Plaintiff; 2) reinstate any and all medical insurance at the place of Defendant's employment and reimburse Plaintiff or any and all out-of-pocket expenses which may have been incurred by her with respect to his actions in terminating said insurance; 3) execute any and all documents necessary to effectuate the transfer of the Defendant's one-quarter interest in the Coco Beach and Pocono time-share units to the Plaintiff as set forth in the Agreement, and reimburse her for any and all out-of-pocket expenses or loss for damages resulting from his actions in exchanging/canceling said units, so as to prevent Plaintiffs use of the same; 4) have delivered to Plaintiff all of those personal property items as set forth on Schedule A of the Agreement; 5) maintain automobile payments on both of the automobiles of the children; and 6) reimburse Plaintiff any and all counsel fees necessary in bringing this cause of action, including court costs.

Defendant filed a Motion to Dismiss the Plaintiff s complaint on January 11, 2000, alleging that the Plaintiff had failed to join necessary parties under Maryland Rule 2-211, namely the parties' two adult children who shared property interests in the time-share properties and the Towson townhouse. An answer to the motion to dismiss was filed by Plaintiff on January 14, 2000, denying the necessity of joining the parties' adult children in the action and contending that the motion to dismiss was a frivolous attempt to delay specific performance by the Defendant as provided for under the Agreement and to intensify Plaintiff's damages resulting therein.

A hearing was held on April 11, 2000, before The Honorable William 0. Carr, and a stipulation modifying the Agreement was placed on the record. The stipulation provided that the Agreement was to remain ill full force and effect with the following modifications: 1) the Defendant's one-third interest in the Towson townhouse was to be transferred to Plaintiff and the parties' adult daughter, Angela, so that Plaintiff and Angela would enjoy a joint tenancy in the townhouse; 2) the parties agreed to sell the Cancun time-share and split the proceeds of that sale; 3) the provision regarding the Defendant's payment for both children's automobile loans was deleted from the Agreement; 4) the mutual waiver of retirement benefits was to continue contingent on disclosure by both parties; and 5) the parties agreed that the transfer of all personal property in the list attached to the Agreement would take place within 30 days.

On May 2, 2000, an Order was signed by Judge Carr allowing for removal of the piano, piano bench and music from the former marital home by Plaintiff and at her expense to take place on May 3, 2001. Plaintiff filed a Complaint for Contempt on May 9,2000, alleging that the Defendant had failed to follow the May 2 Order by refusing to cooperate with respect to the pick up by the Plaintiff of the piano, piano bench and music. A Motion to Vacate [the May 2, 2000] Order was filed by the Defendant on May 12, 2000, arguing that Plaintiff had improperly made an ex parte application to the Court in order to obtain the May 2, 2000, Order which was not in accord with the parties' stipulation placed on the record on April 11, 2000. Plaintiff filed a Response to the Motion to Vacate Order on May 2, 2000, Order allowing for Plaintiff's removal of the piano, piano bench and music since it was an improper ex parte

order which was not agreed upon by the parties.

On July 5, 2000, the Plaintiff filed a Complaint for Judgment of Absolute Divorce with an attached transcript of the April 11, 2000, Stipulation on the Record requesting that she be granted a judgment of absolute divorce incorporating the Agreement and the April 11, 2000, modifications thereto. She also requested that she be granted the use of her maiden name.

An Amended Complaint for Judgment of Absolute Divorce, Specific Performance, Damages and Other Relief was filed by the Plaintiff on September 22, 2000. In the Amended Complaint, Plaintiff alleged that the Defendant: 1) failed to convey to Plaintiff of his right, claim, title and/or interest in and to the Towson townhouse, despite repeated requests; 2) has refused and continues to refuse to relinquish personal items listed in the Agreement to Plaintiff; 3) has refused and continues to refuse to execute a transfer of title and gift certificate top the 1997 Lincoln Town Car to Plaintiff; 4) has refused and continues to refuse to make payments for the automobiles of the children, namely a 1995 Chevrolet Neon and a 1997 Chevrolet S10 truck; 5) interfered with and caused to be canceled the time-share plans of the Plaintiff; 6) refused and continues to refuse to maintain medical insurance on behalf of the adult child of the parties, namely Christopher Sherman, causing Plaintiff to incur the expense of maintaining such insurance; and 7) caused Plaintiff considerable expenses and loss of economic use of certain properties and items by and through his wilful and malicious actions. The Plaintiff requested that the Court order Defendant's specific performance as to each of the allegations in the amended complaint and award her monetary damages for Defendant's wilful, wrongful and

2000, he had filed a Petition for Bankruptcy under Chapter 13 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Maryland, Case No. 00-6-2818.[8] Plaintiff and her counsel, Henry Stewart, Esquire, were listed as unsecured, non-priority creditors on schedule F of Defendant's bankruptcy petition. An order staying proceedings during the Defendant's bankruptcy case was signed by Judge Marshall on November 13, 2000. Subsequently, on April 3, 2001, the Defendant received a discharge from the United States Bankruptcy Court as to all claims against his property and estate as listed in his bankruptcy petition.

The case came for trial on the merits as pertaining to the divorce and property issues on June 25, 2001. At that hearing, the Plaintiff requested that the Court order specific performance of the Defendant's remaining property obligations under the Agreement as well as punitive damages and attorney's fees due to Defendant's wilful refusal to abide by the Agreement. Specifically, the Plaintiff urged the Court to address the following outstanding obligations: 1) the transfer of Defendant's one-third interest in the Towson townhouse to Plaintiff and Angela Sherman as joint tenants; 2) the transfer of Defendant's-one-quarter interest in the parties' Cocoa Beach and Pocono time-share units to Plaintiff; 3) reimbursement for health insurance expenses for Plaintiff and Christopher Sherman in the total amount of $385.11 to Plaintiff; 4) reimbursement for Plaintiffs out-of-pocket expenses due to Defendant's time-share cancellation(s) in the total amount of $6,717.45 to

---

1 Defendant's Chapter 13 bankruptcy petition was later converted to a Chapter 7 filing under which it was subsequently discharged.

Plaintiff; 5) payment of one-half of Defendant's settlement proceeds from his resolved claim with his former employer, Physician Support Services, LLC, in the total amount of $13,500.00 to Plaintiff; 6) transfer of an interest in Defendant's pension plan due to his non-disclosure of his retirement benefit information to Plaintiff; 7) transfer of certain personal property[9] as listed in Schedule A of the Agreement to Plaintiff; 8) transfer of the title and gift certificate form for the 1997 Lincoln Town Car to Plaintiff; and 9) payment of attorney's fees for Plaintiff s counsel in the total an1ount of $7 ,937.50 to Plaintiff.

The Defendant urged the Court that he was no longer liable to the Plaintiff for any of the obligations made under the Agreement due to his subsequent discharge in bankruptcy. Additionally, Defendant argued that the Plaintiff's complaint should have been dismissed due to her failure to join necessary parties, namely the parties' two children, under Maryland Rule 2-211 because both of their interests as joint owners in four of the time-share units and Angela's interest as one-third owner in the Towson townhouse would be impaired or impeded by the outcome of this proceeding. Furthermore, the Defendant alleged that Plaintiff had not fulfilled her obligations under the Agreement by not transferring her interest in the marital home to Defendant. Defendant contends that based on his

---

2 The specific items of personal property alleged not to have been returned to Plaintiff are spelled out in the Plaintiff's Exhibit 5 as follows: two lamps from family room; futon from basement; patio furniture (Rubbermaid storage container, Hot tub, four white stacking chairs); picture from family room wall; Longaberger baskets; white crotcheted bedspread from grandmother; one-half crafts made by Angie and Chris during school years; sky chair from basement; and one-half of tools (such as hammer, screwdrivers, power tools, weedwacker).

understanding of the Agreement, Plaintiff was only to receive Defendant's interest in one of the Cocoa Beach time-share units. Defendant also alleges that the parties had agreed to split their son's college tuition, but Plaintiff has not contributed [10]

As indicated above, the Court granted Plaintiff an absolute divorce and the use of her maiden name. This opinion addresses the outstanding property issues between the parties described in their Marital Settlement Agreement of June 30, 1999, and Stipulation on the record of April11, 2000, and how these obligations are affected by Defendant's discharge in bankruptcy.

STANDARD OF REVIEW

A. Court's Authority to Enforce Marital Property Settlement Agreements in Divorce Cases

The Court of Appeals has long recognized the validity of property settlements between husband and wife. See Md. Code Ann. Fanl. Law § 8-101 (2001); Frana v. Frana, 12 Md. App. 273, 278 A.2d 94 (1971); Brown v. Brown, 248 Md. 139, 235 A.2d 706 (1967); and Grossman v. Grossman, 234 Md. 139, 198 A.2d 260 (1964). Courts are empowered to recognize and enforce separation and property settlement agreements. See Eigenbrode v. Eigenbrode, 36 Md. App. 557,373 A.2d 1306 (1977 Jackson v. Jackson, 14 Md. App. 263,286 A.2d 778 (1972); Lewis v. Lewis, 256 Md. 45,259 A.2d 24 (1969); and

---

3 Nowhere in the Agreement or the April 11, 2000, stipulation on the record can this Court determine that the parties agreed to split their son's college tuition. Therefore, the Plaintiff's alleged failure to fulfill this obligation will not be addressed in this opinion.

Reichhart v. Brent, 247 Md. 66,230 A.2d 326 (1967). A separation agreement being contract between the parties is subject to the *same general rules governing other contracts,* and particular questions must be resolved by reference to the particular language of the agreement. See Pumphrey v. Pumphrey, 11 Md. App. 287, 273 A.2d 637 *(1971);* and Eigenbrode v. Eigenbrode, 36 Md. App. 557, 373 A.2d 1306 (1977).

Courts of equity have the power to specifically enforce separation agreements. See Borotka v. Boulay, 268 Md. 244, 299 A.2d 803 (1973) (provision in separation agreement binding husband to maintain in force life insurance policies naming wife as primary beneficiary) and Faller v. Faller, 247 Md. 631, 233 A.2d 807 (1967). A court of equity will not require specific performance of a separation agreement as a matter of course, but will evaluate the conduct of the parties, and circumstances and equities of each particular case and will not exercise its discretion to grant a remedy unless it will subserve the ends of justice and the result of its assistance will be fair, just, and reasonable. See Parkinson v. Parkinson, 42 Md. App. 650, 402 A.2d 129 (1979).

B. Effect on Marital Settlement Agreement on Defendant's Discharge in Bankruptcy

Whether a debt or claim will be discharged in bankruptcy is to be determined by the bankruptcy court. ~ 11 U.S.C. § 501 ~. (2001) and 28 U.S.C. § 1334(b) (2001). It logically follows that t] question of whether obligations under a property settlement agreement between spouses is discharged: in bankruptcy is to be determined in the same manner and federal bankruptcy law is to be applied.. See id.

The Bankruptcy Code defines the term "claim" as follows:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured[.]

11 U.S.C. § 101(5) (2001). See also In re Wang Zi Cashmere Products. Inc., 202 B.R. 228,232 (Bankr. D.Md. 1996) (The term "claim is defined in the Bankruptcy Code to include any right to payment and need not be fixed and may be contingent or unliquidated.) The Fourth Circuit Court of Appeals held in the case of Stewart Foods, Inc. v. Broeker, 64 F.3d 141 (1995):

> Congress intended to adopt the broadest possible definition of the term "claim," so that a bankruptcy case would deal with all of the debtor's legal obligations. The House and Senate Reports to the Bankruptcy Reform Act of 1978 state the following about the definition of "claim":

> By this broadest possible definition, and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.
>
> H.R. Rep. No.95-595, 95th Cong., Ist Sess. 309 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6266; S.Rep. No.95-989, 95th Cong., 2d Sess. 22 (1978), reprinted in 1978 U.S.C.C.A.N. 5787,5808; see also Johnson v. Home State Bank, 501 U.S. 78,83,111 S. Ct. 2150,2153-54, 115 L.Ed. 2d 66 (1991) ("Congress intended by [the language of 11 U.S.C. § 101(5) to adopt the broadest available definition of 'claim.'"); Grady v. A.H. Robins Co., 839 F.2d 198,200 (4th Cir. 1988).

64 F.3d at 144.

In a number of cases, it has been held or recognized that a property settlement between spouses is dischargeable in bankruptcy, at least where it is truly or substantially a property settlement agreement, and not an agreement for alimony, support, or maintenance as excepted under 11 U.S.C. § 523 (a)(5).[11] See Shacter v. Shacter, 467 F. Supp.

---

4 11 U.S.C. 523 (a)(5) substantially provides that an individual debt may be excepted from discharge if it is "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement..." The statute goes on to qualify that such debt must "actually [be] in the nature of alimony, maintenance or support" in order to be nondischargeable as such. See id.

64 (D. Md.), aff'd without published opinion, 610 F.2d 813 (4th Cir. 1979); In re Stone, 79 B.R. 633 (D. Md. 1987); In re Coffman, 52 B.R. 667 (D. Md. 1985); and Melichar v. Ost, 7 B.R. 951 (D. Md. 1980) (all dealing with the bankrupt's obligation *to make certain payments* to former spouse pursuant to a marital settlement agreement). It is the creditor's obligation to raise the issue of nondischargeability of debts to the bankruptcy court by filing a complaint. See Fed. R. Bankr. P. 4004 and 4007. In failing to raise an objection, the creditor waives the right to object, and the claim may be subsequently discharged in bankruptcy. See id.

Discussion

As suggested above, an equity court may require specific performance of a marital settlement agreement between spouses after a thorough evaluation of the conduct and the circumstances and equities between the parties in a particular case. In the case at hand, the Court must look at the totality of the circumstances including the Agreement and stipulation on the record between the parties, the obligations under those agreements, most of which have not been fulfilled, as well as the Defendant's subsequent discharge in bankruptcy ultimately relieving him of a plethora of financial obligations. In viewing all of this, the Court finds it fair, just, and reasonable to compel specific performance of the outstanding obligations under the parties' Agreement that have not been discharged by Defendant's bankruptcy.

According to bankruptcy law, if a claim means "right to payment" as it is so broadly defined by Congress, then it would follow that any pre-petition claim that Plaintiff has against Defendant requests monetary relief or could possibly result in a claim for monetary payment(s) is unenforceable at this point based on Defendant's discharge in bankruptcy. Therefore, this Court no longer has to enforce any pre-bankruptcy obligations of the Defendant which result in a monetary award or payment to the Plaintiff. However, any obligations of the Defendant to the

Plaintiff arising out of the Agreement and subsequent stipulation on the record which are solely equitable and do not foreseeably result in a compel specific performance of certain outstanding property settlement obligations remaining between the parties.

The bankruptcy court discharged Defendant for his "various claims arising from and/or relating to the marriage and separation of the parties" assigned to Plaintiff. Defendant would like this Court to find that this broad language covers any and all obligations that he may have incurred by
Agreement, including those of transferring title and/or interests in certain properties and of transferring p personal property to his wife. The Court is not so inclined to accept Defendant's interpretation.

While it is true that the bankruptcy court has relieved the Defendant of his financial responsibilities, certain provisions of the Agreement between the parties still have some equitable value and are enforceable by this Court. Those provisions dealing solely with the transfer of Defendant's interest in certain property to Plaintiff are clearly within the authority of this Court to compel performance on. Likewise, the provision requiring Defendant to return/transfer specific personal property items to Plaintiff is within the Court's power to enforce. Because these types of obligations are not within the bankruptcy court's scope of a "claim" as a broadly defined "right to payment," Plaintiff had no obligation to argue their nondischargeability during the bankruptcy proceeding. These obligations are equitable in nature and are purely within the purview of this court to specifically enforce within the divorce proceeding. In fact, it is clear from the meeting of creditors transcript submitted to this Court by the Plaintiff, that the bankruptcy trustee (as well as the Defendant himself and his bankruptcy attorney) acted as if

the "transfer of property" obligations[12] under the Agreement had already taken place pursuant the authority of this Court prior to the bankruptcy proceeding. The Defendant cannot now be shielded by his bankruptcy discharge from fulfilling obligations under the parties' Agreement that he convincingly argued to the bankruptcy court had already been fulfilled.

The Court finds that it is within its power to specifically compel the Defendant to abide by those terms of the Agreement as follows: 1) Defendant is to transfer his one-third interest in the Towson townhouse to Plaintiff and Angela Sherman as joint tenants; 2) Defendant shall transfer his one-quarter interest in the parties' Pocono time-share unit and all three Cocoa Beach time-share units to Plaintiff;[13] 3) Defendant must transfer/return the remaining personal property items listed in Plaintiffs Exhibit 5 to Plaintiff, excepting the hot tub and Rubbermaid storage container which this Court simply does not define as patio furniture; and 4) Defendant shall sign a gift certificate form for and transfer the title of the 1997 Lincoln Town Car to Plaintiff.

---

5 In using the term "transfer of property obligation," this Court is referring to those provisions of the Agreement which require a transfer of interest in property between the parties. These provisions include the transfer of Defendant's interest in the Towson townhouse, the Plaintiff's transfer of interest in the Bel Air property, both the Defendant's and the Plaintiff's transfers of interest in the time-share units, the signing of the gift certificate form and transfer of Defendant's interest in the Lincoln Town Car, and the transfer/return of personal property items to Plaintiff.

6 The plain language of the agreement that the Plaintiff is to receive the Defendant's interest in all three Cocoa Beach time-shares as the agreement attempts to deal with all of the parties' marital assets, and it does not specifically refer to any type of division of the three Cocoa Beach units owned by the parties' and their children.

As to the remaining financial obligations that Defendant is alleged to owe Plaintiff under the Agreement, this Court has no authority to compel performance based on Defendant's discharge in bankruptcy. The other five remaining obligations argued by Plaintiff at the hearing are clearly "right to payment" obligations that were discharged by the bankruptcy court. The following obligations of the Defendant cannot be specifically enforced under the Agreement as a result of his bankruptcy discharge: 1) reimbursement for health insurance expenses for Plaintiff and Christopher Sherman in the total amount of $385.11 to Plaintiff; 2) reimbursement for Plaintiffs out-of-pocket expenses due to Defendant's-time-share cancellation(s) in the total amount of$6,717.45 to Plaintiff; 3) payment of one- half of Defendant's settlement proceeds from his resolved claim with his former employer, Physician Support Services, LLC,[14] to Plaintiff; 4) transfer of an interest in Defendant's pension plan due to his non-disclosure of his retirement benefit information to Plaintiff;[15] and 5) payment of attorney's fees for Plaintiffs

---

7 From the testimony presented at the Court hearing, it is estimated that this claim has a possible total value of $13,500.00.

8 It should be noted that in paragraph 10 of the Agreement, both spouses agreed to a waiver of any interest in the other spouses's retirement benefits. This waiver was subsequently modified during the April 11, 2000, stipulation on the record to be contingent on full disclosure of his retirement benefits invalidates the waiver. This issue has become moot based on this opinion and the Court's finding that any claim for an interest in Defendant's retirement benefits is an unenforceable "right to payment" claim based upon Defendant's discharge in bankruptcy.

If Plaintiff wanted to argue that these five claims arising out of the parties divorce and separation should have been excepted as nondischargeable alimony, maintenance and/or support under 11 U.S.C. 523 (a)(5), then she clearly had the right to argue that position to the bankruptcy court based on her participation and representation by George Breschi, Esquire, in that proceeding. As stated above, it is the creditor's obligation to file a complaint as to nondischargeability within sixty days of the date of the first meeting of creditors in an attempt to have the bankruptcy court determine that a claim is nondischargeable alimony, support and/or maintenance. Since the Plaintiff failed to raise the issue during the bankruptcy proceeding, she cannot now urge this Court to view the claims as nondischargeable. The issue of whether debts covered in a prior U .S. Bankruptcy Court case are nondischargeable is clearly not within the equity court's power to decide. Thus, the only authority that this court may act on is the determination that all of Defendant's pre-petition "right-to-payment" obligations, including those to the Plaintiff, were clearly discharged by the bankruptcy court.

The Court further finds that Defendant's remaining argument that Plaintiffs Complaint should be dismissed for her failure to join the parties' two adult children, Angela and Christopher Sherman, in this lawsuit under Maryland

---

breaches of the Agreement invalidate this waiver and allow her to now make a claim for her reasonable attorney's fees incurred in this divorce proceeding. This issue, too, has become moot based on this opinion and the Court's finding that any claim for attorney's fees is an unenforceable "right to payment" claim based upon Defendant's discharge in bankruptcy.

Rule 2-2111[17] is without merit. Defendant's transfer of interest in the Towson townhouse neither impairs nor impedes Angela Sherman's interest in that property. In fact, the parties' stipulation on the record modifying the Agreement actually has the effect of positively her interest from one-third to one-half owner in the Towson property. Likewise, as to the interest of Angela and Christopher in the Pocono and three Cocoa Beach time-share units, Defendant's transfer of his one-quarter interest in those units to Plaintiff in no manner impairs or impedes the children's interests in those same properties. The children began with a one-quarter interest each in those same properties, and will continue to have that same percentage of interest, despite the transfer. Since it is evident neither of the children's interests will be impaired or impeded as a result of transfers resulting from specific enforcement of the Agreement in this matter, the Defendant's argument that the children should be joined as necessary parties must ultimately fail.

As a final note, the Court declines the invitation by Plaintiff to award any type of punitive damages for Defendant's noncompliance with the Agreement. Clearly, both parties have to all of their obligations under the Agreement for various reasons that are irrelevant to the Court's decision in this matter, and the Court does not find that an award of punitive damages appropriate in this case.

CONCLUSION

As to Plaintiff s Complaint, the Court finds that there are several outstanding property settlement

---

10 Maryland Rule 2-211 requires parties to be joined "in the action if in the person's absence, (1) complete relief cannot be accorded..., or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action..."

obligations that are specifically enforceable and incorporates, but not merges mentioned provisions of the Agreement, as modified by the parties' subsequent stipulation on the record, into the parties Judgment of Absolute Divorce.

Specifically, the Court finds that: 1) Defendant is to transfer his one-third interest in the Towson townhouse to Plaintiff and Angela Sherman as joint tenants in accordance with paragraph 7 of the Agreement and the April 11, 2000, modifications thereto; 2) Defendant shall transfer his one-quarter interest in the parties' Pocono time-share unit and all three Cocoa Beach time-share unit and all three Cocoa Beach time-share units to Plaintiff[18] in accordance with paragraph 9 of the Agreement; 3) Defendant must transfer/return remaining personal property items as listed on Plaintiffs Exhibit 5 to Plaintiff in accordance with paragraph 8A of the Agreement with the two above-listed exceptions of the hot tub and Rubbermaid storage container; 4) Defendant shall transfer the title and sign a gift certificate form for the 1997 Lincoln Town Car to Plaintiff in accordance with paragraph 8B of the Agreement; 5) Plaintiff must transfer her interest in the Bel Air property to the Defendant in accordance with paragraph 6 of the Agreement; 6) Plaintiff is to transfer her one-half interest in the Orlando time-share unit to Defendant in accordance with paragraph 9 of the Agreement; and 7) Plaintiff and Defendant are required to sell the Cancun time-share and split the proceeds equally in accordance with the April 11, 2000, stipulation on the record.

---

11 The plain language of the agreement indicates that the Plaintiff is to receive the Defendant's interest in all three Cocoa Beach time-shares as the agreement attempts to deal with all of the parties' marital assets, and it does not specifically refer to any type of division of the three Cocoa Beach units owned by the parties' and their children.

LYNNE P. SHERMAN * IN THE

Plaintiff * CIRCUIT COURT

v. * FOR

LAWRENCE R. SHERMAN * HARFORD COUNTY

Defendant * Case No: 12-C-99-3055

* * * * * *

ORDER

The Circuit Court for Harford County having heard arguments, taken testimony, considered the pleadings, and issued a Memorandum Opinion, it is this *27* Day of July, 2001,

ORDERED as follows:

1. The Plaintiff, LYNNE P. SHERMAN, is divorced absolutely from the Defendant, LAWRENCE R. SHERMAN.

2. The Plaintiff, LYNNE P. SHERMAN, is granted the use of her maiden name, LYNNE P. TROUTWEIN.

3. The Defendant shall transfer his one-third interest in the Towson townhouse to Plaintiff and Angela Sherman as joint tenants in accordance with paragraph 7 of the Agreement and the April 11, 2000, stipulated modifications thereto;

4. The Defendant shall transfer his one-quarter interest in the parties' Pocono time-share unit and all three Cocoa Beach time-share units to Plaintiff in accordance with paragraph 9 of the Agreement

5. The Defendant shall transfer/return the remaining personal property items as listed on Plaintiff s Exhibit 5 to Plaintiff in accordance with paragraph 8A of the Agreement except for the Hot tub and Rubbermaid storage container.

6. The Defendant shall sign a gift certificate form for and transfer the title of the 1997 Lincoln Town Car to Plaintiff in accordance with paragraph 8B of the Agreement.

7. The Plaintiff shall transfer her interest in the Bel Air property to the Defendant in accordance with paragraph 6 of the Agreement.

8. The Plaintiff shall transfer her one-half interest in the Orlando time share unit to Defendant in accordance with paragraph 9 of the Agreement.

9. The Plaintiff and Defendant shall sell the Cancun time share and split the proceeds equally in accordance with the April 11, 2000, stipulation on the record.

10. The parties' Marital Settlement Agreement dated June 30, 1999, with the exception of the provisions resulting in claims which were discharged by the Defendant's bankruptcy as more fully described in the attached Memorandum Opinion, are to remain in full force and effect and to be incorporated, but not merged into the parties' Judgment of Absolute Divorce.

IT IS SO ORDERED THIS 24 DAY OF JULY, 2001.

"s/_____"
MAURICE W. BALDWIN, JR., Judge

True Copy:
Test: Charles G. Hiob, III, Clerk
By: "s/_____"
Deputy Clerk

cc: Henry W. Stewart, Esq.
Law Offices of Henry W. Stewart, P .A.
209 Courtland A venue
Towson, Maryland 21204

George A. Breschi, Esq.
409 Washington A venue, Suite 600
Towson, Maryland 21204

Jonathan S. Greene, Esq.
Howanski & Greene
410 Washington Avenue, Suite 803
Towson, Maryland 21204